

THIRD DIVISION
December 28, 2011

No. 1-10-0198

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
)	CIRCUIT COURT
Plaintiff-Appellee,)	OF COOK COUNTY
)	
v.)	No. 06 CR 01766-03
)	
JOYCE MCGEE,)	HONORABLE
)	JOHN JOSEPH HYNES,
Defendant-Appellant.)	JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

O R D E R

¶ 1 *HELD*: During a bench trial for murder, defendant McGee was not deprived of her due process rights where videotaped interrogations containing hearsay statements of nontestifying codefendants and police opinion of her credibility were introduced at trial, and the showing of the unredacted video tapes was invited error. Additionally, McGee did not receive ineffective assistance of counsel where counsel requested all seven hours of the videotape be played invited the error and she was not prejudiced. The trial court's sentence was appropriate where all aggravating and mitigating factors were considered. We affirm.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant, Joyce McGee, was found guilty of felony murder by accountability. The trial court sentenced McGee to a 40-year

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prison term. On appeal, McGee contends: (1) she was deprived of her due process rights to a fair trial and to confront the witnesses against her where videotaped interrogations containing hearsay statements of nontestifying codefendants and police opinions of her credibility were introduced at trial; (2) she received ineffective assistance of trial counsel because she was prejudiced by the admission of the videotapes; and (3) her 40-year sentence for felony murder is excessive. For the following reasons, we affirm McGee's conviction of murder and the 40-year prison sentence.

¶ 3

BACKGROUND

¶ 4 Joyce McGee was arrested December 27, 2005, for the first degree murder of Abimbola Ogunniyi, a cab driver working for the Gant South Side Livery service. McGee and codefendants Elliot Peterson and Jamille Brown were tried for the murder, with Peterson and Brown electing jury trials and McGee a bench trial.

¶ 5 Police learned McGee's phone was used to call Gant South Side Livery service to request a cab. During the interrogation, McGee initially stated she did not know who made two calls from her phone that day. After a detective requested she check her phone to see who made calls around 4 p.m., McGee stated that the only call she made was at 10:30 a.m. to her sister. Eventually, she denied making any calls. She also claimed friends of codefendant Peterson named Pee Wee and Carl used her phone to call a cab, and then they robbed and murdered the cab driver.

¶ 6 McGee later admitted she lied to the police about the phone use, Carl and Pee Wee. After admitting she was untruthful, McGee told the police she and codefendants spent the night at Peterson's apartment the night before the shooting. Peterson called the South Side Livery cab

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company using McGee's cellular phone. Although she gave numerous conflicting accounts throughout the interrogation, McGee stated she and the codefendants planned to evade payment of the cab fare, and steal the cab to use while robbing an armored car. When the SUV cab arrived, McGee and the codefendants gave McGee's address to the driver as the destination. Peterson redirected the driver to an alley near 87th and Pulaski. There, McGee and Brown jumped out of the cab, and from outside watched Peterson point the gun at the driver inside the cab. The driver and Peterson exited the cab and Peterson told the driver to remove his clothing. The two women ran to the front of the cab while Peterson and the driver walked to the rear. McGee then heard the gun discharge. She jumped into the front passenger side of the cab and Brown got into the driver's seat. Peterson got in the cab and sat in the back seat. Brown drove off at the behest of Peterson, leaving the wounded cab driver in the alley. Ogunniyi suffered a gunshot wound to his left thigh and died from the injury. He was found face down in the alley by a group of friends who called 911 and waited for the police to arrive.

¶ 7 When the police arrived, Ogunniyi did not have a pulse and was laying in a pool of blood. Police found a denim shirt and baseball hat lying in blood on the scene. Ogunniyi's son later identified these items as belonging to his father. Meanwhile, Brown parked the cab near Christ Hospital where Peterson removed the driver's wallet from the glove compartment. The cab was registered to Ogunniyi and found abandoned in the area of 94th and Kenton in Oak Lawn, approximately a mile from the crime scene.

¶ 8 Peterson, Brown and McGee went to Walgreens and purchased a candy bar to make change for the bus. McGee's interrogation responses vary as to whether she knew the driver had

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been shot at this point in time that night. McGee helped Peterson dispose of Ogunniyi's clothing and other belongings. Her fingerprint was found on Ogunniyi's broken cellular phone. She never called the police. At the police station, McGee was interrogated by two officers over the course of several days. The interrogation was videotaped, amounting to seven hours of tape.

¶ 9 McGee's counsel filed and later withdrew a motion to quash arrest and suppress statements contained in the videotapes. At trial, the judge noted in his findings of fact that McGee's statements made during the interrogation tapes were voluntary and that he would have denied the motion to suppress had it not been withdrawn. The court found McGee guilty of felony murder based on accountability. She was sentenced to 25 years' incarceration for first degree murder, with a 15-year sentencing enhancement for crimes committed with firearms, for a total of 40 years' incarceration. This timely appeal followed.

¶ 10 DISCUSSION

¶ 11 McGee first argues she was deprived of her due process rights to a fair trial and to confront the witnesses against her where videotaped interrogations containing hearsay statements of nontestifying codefendants and police opinions of her credibility were introduced at trial. The State argues McGee forfeited the issue by failing to object at trial or raise it in a posttrial motion. Forfeiture is a limitation on the parties, not the court. *People v. Carter*, 406 Ill. App. 3d. 954, 957 (2010). Specifically, McGee argues playing the videotape was consideration of improper evidence violating her right to confrontation through cross-examination, and depriving her of the opportunity to confront her accusers and to challenge the reliability and credibility of the evidence or her codefendants' testimonial hearsay statements from the police investigation.

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McGee further argues playing the videotape in open court invaded the province of the trier of fact, where the trier of fact alone is charged with assessing credibility, weighing evidence and deciding the ultimate issue of McGee's guilt. McGee further contends the admission of the videotape was not harmless. She reasons that she was not involved with the plan to steal the cab and rob the armored car, and claims that she barely knew codefendant Peterson. Yet, she maintains the admission of the videotape introduced improper hearsay evidence that McGee was involved in the plan to steal the cab and rob the armored car. However, we must first consider the State's threshold argument of invited error before considering McGee's hearsay contentions.

¶ 12 The State argues McGee invited the alleged error when she requested that the trial court view all seven hours of videotaped statements in order to comport with the doctrine of completeness. Under the doctrine of invited error, sometimes referred to as "estoppel," a defendant " 'may not request to proceed in one manner and then later contend on appeal that the course of action was in error.' " *People v. Lucas*, 231 Ill. 2d 169, 174 (2008) (quoting *People v. Harvey*, 211 Ill. 2d 368, 385 (2004)). Active participation in the direction of proceedings goes beyond mere waiver. *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). The rationale behind this well-established rule is that it would be manifestly unfair to allow a party to have a second trial based upon the error which that party injected into the proceedings. *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). This court ought not address due process issues without first resolving the threshold issue of invited error. *Id.* at 218. Furthermore, our supreme court has declined to review a claim for plain error where the alleged error was invited. *People v. Patrick*, 233 Ill. 2d 62, 76–77 (2009). However, absent evidence the defendant personally invited the

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alleged error, the doctrine generally does not bar considering related claims of ineffective assistance of counsel. See *Villarreal*, 198 Ill. 2d at 228.

¶ 13 In this case, the record shows defense counsel Goldberg invited the error when, instead of objecting to the State playing the taped confession, he unambiguously requested all seven hours of the videotape be shown for completeness, which include any alleged hearsay and improper police opinions:

"MR. GOLDBERG: Just for the record, at this point in time, I mean the State is introducing this document; this tape, as an exhibit for an admission against the Defendant, but through the discovery that has been indicated to me that there is seven and a half hours of video tape and *I have no objection to this video tape being introduced as long as all the other video tapes regarding her statements are introduced also as far as completeness is concerned.*" (Emphasis added.)

¶ 14 McGee further asserts ineffective assistance of trial counsel, reasoning trial counsel unreasonably and prejudicially failed to adequately object to the admission of the videotaped interrogation and to preserve this claim for review. Generally, in order to show ineffective assistance of counsel, a defendant must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's alleged deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We must show great deference to the attorney's decisions as there is a strong presumption that an attorney has acted adequately. *Strickland*, 466 U.S. at 689. A defendant must overcome the strong presumption the challenged action or inaction "might have been the product of sound trial strategy." *E.g., People*

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v. Evans, 186 Ill. 2d 83, 93 (1999) (and cases cited therein). Every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Because effective assistance refers to competent and not perfect representation, mistakes in trial strategy or judgment will not, by themselves, render the representation incompetent. *People v. Calhoun*, 404 Ill. App. 3d 362, 383 (2010) (and cases cited therein). To satisfy the prejudice prong of the *Strickland* test, a defendant must demonstrate a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *Strickland*, 466 U.S. at 687; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Such a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a reviewing court finds that the defendant did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient. *People v. Buss*, 187 Ill. 2d 144, 213 (1999).

¶ 15 On appeal, McGee asserts that withdrawing the motion to suppress did not preclude counsel from objecting to admission of the entire videotape. However, counsel may have sought to have the trial judge view the entire seven hours of videotape in execution of his trial strategy that McGee's inculpatory statements were the product of a protracted, coercive interrogation and therefore would not have objected (and did not). Therefore, McGee cannot show counsel's performance was deficient. See *People v. Jones*, 371 Ill. App. 3d 303, 307-08 (2007). Further, the trial judge stated in his findings of fact that he understood defense counsel's strategy in withdrawing the motion to suppress was to allow defense counsel to make those arguments at

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trial.

¶ 16 Counsel's opening argument strongly outlines his trial strategy was exactly as such. In pertinent part, McGee's opening argument stated:

"The police investigation into this case and you'll see the videotapes and you'll see the conduct of the police. *** And when she went into that police station, she didn't know anybody had gotten killed. The police didn't tell her anybody had gotten killed. And the police didn't even tell her anybody had gotten shot until after she gives her first story. And, yes, it was a story. It was a story that she felt it didn't hurt to spin. *** And as time went on, as the police officers kept taking her and questioning her about what happened, they kept on leaving the room, coming back, saying they had other people saying she wasn't telling the truth. You'll see her crying on the tape. You'll see the police officers yelling at her. Trying to endear her with terms of honey, dear, you'll be okay. Or you're going to go to the penitentiary. Or you're going to spend the rest of your life in jail, you got to 'fess up. She turned from an individual who was 18 years old, who went in there not knowing anybody had gotten killed, to being in a position where *the police officers in this case were basically brow beating her* into, go ahead and make the parts of the puzzle stick. *** She answered questions, after everything is reviewed in this case, based on the misconduct and the conduct of the police." (Emphasis added.)

Therefore, McGee does not meet the first prong of the ineffective assistance of counsel test.

Assuming *arguendo* that we were to find defendant established counsel's representation was deficient, McGee was not prejudiced by the admission of all seven hours of the tape.

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¶ 17 McGee claims she was prejudiced by the admission of the entire videotape, arguing it contained hearsay statements by her codefendants and the opinion of the police that her codefendants were telling the truth and McGee was lying. The State claims McGee suffered no prejudice, arguing there is no reasonable probability that the outcome of the trial would have been different had the alleged hearsay and opinion been redacted. Because the State's account of McGee's interrogation is accurate, there is no prejudice, because "when a trial court is the trier of fact a reviewing court presumes that the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion." *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). We are of the position that even if a redacted version of the tape were played, the outcome of the trial would not have changed.

¶ 18 Lastly, McGee argues her sentence is excessive, based on her age, lack of criminal history, education, employment, remorse, and degree of participation in the crime. It is well established that the sentence imposed by a trial court is entitled to great deference. When the sentence is within the statutory limits, it may be disturbed only where the trial court has abused its discretion. *E.g., People v. Alexander*, 239 Ill. 2d 205, 212 (2010); *People v. Bosley*, 233 Ill. App. 3d 132, 139 (1992) (and cases cited therein). As long as the trial court " 'does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense.' " *Bosley*, 233 Ill. App. 3d at 139 (quoting *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990)). The trial court has no obligation to recite and assign value to each factor presented at a sentencing hearing. *People v. Baker*, 241 Ill. App. 3d 495, 499 (1993). Where mitigating

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evidence is presented to the trial court during the sentencing hearing, we may presume that the trial court considered it, absent some indication other than the sentence itself, to the contrary.

People v. Dominguez, 255 Ill. App. 3d 995, 1004 (1994).

¶ 19 In this case, McGee concedes that because the murderer used a firearm, the minimum sentence for felony murder by accountability is 35 years. See 730 ILCS 5/5-8-1(a)(1)(a), (a)(1)(d)(1) (West 2008). The trial court imposed a 40-year sentence, only 5 years above the minimum. The record shows the trial judge heard and considered the evidence in aggravation and mitigation. As such, we find the sentence appropriate.

¶ 20 CONCLUSION

¶ 21 McGee's counsel invited error, requesting the video tape of McGee's interrogation be played in its entirety as a part of his trial strategy to show McGee's statements were involuntary. Consequently, there is no meritorious claim for ineffective assistance of counsel. Finally, given the judge's consideration of aggravation and mitigation, along with the statutory guidelines, we find the 40-year sentence is appropriate. Based upon the foregoing, we therefore affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.